

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LAUDENCIO MAGDAY PATAGUE,

Defendant and Appellant.

H046138

(Santa Clara County
Super. Ct. No. C1764094)

Contending that the trial court lacked statutory authorization, appellant Laudencio Magday Patague appeals the trial court's order that he pay an AIDS education fine in connection with his convictions for a number of criminal offenses. Patague further argues that the abstract of judgment incorrectly records the amount of the sex offender fine ordered by the trial court. The Attorney General concedes both points. We agree that the AIDS education fine must be stricken, but we conclude that the trial court lacked jurisdiction to impose the sex offender fine in the amount it selected. We therefore remand the matter to the trial court for reconsideration of this fine. As modified, we affirm the judgment.

I. FACTS AND PROCEDURAL BACKGROUND

The facts of Patague's crimes are not relevant to this appeal. Pursuant to a written plea agreement, Patague pleaded no contest to three counts of committing a lewd or

lascivious act on a child by force (Pen. Code, § 288, subd. (b)(1)) and agreed to serve a sentence of 25 years in prison.¹ Patague committed the crimes to which he pleaded guilty between November 28, 2009, and November 27, 2013. At sentencing, the trial court sentenced Patague to the agreed-upon term of 25 years in prison. Among other terms of the sentence, the trial court stated, “The defendant is also ordered to register pursuant to [section] 290 of the [P]enal [C]ode, and comply with section 290.85 of the [P]enal [C]ode. [¶] A fine of \$200 plus penalty assessment is imposed.” The trial court also stated, “An AIDS education fine of \$70 is imposed” and “a general restitution fine of \$300 will be imposed. An additional restitution fine of an amount equal to that will be imposed and then suspended.”

The abstract of judgment prepared after Patague’s sentencing hearing does not reflect the imposition of an AIDS education fine. The abstract indicates that the trial court imposed a fine of \$300 and a penalty assessment of \$930 pursuant to section 290.3. The abstract additionally states that the court imposed a restitution fine of \$300 pursuant to section 1202.4, subdivision (b) and imposed and suspended a restitution fine of \$300 pursuant to section 1202.45.

II. DISCUSSION

A. AIDS Education Fine

Patague contends that he was not convicted of any crime to which the AIDS education fine applied, and therefore the fine must be stricken. The Attorney General agrees, as do we.

Former section 1463.23 (now repealed) authorized moneys from fines associated with particular criminal convictions to be used for AIDS education programs. (Former § 1463.23.) Former section 1463.23 provided in relevant part, “Notwithstanding Section 1463, out of the moneys deposited with the county treasurer pursuant to Section 1463,

¹ All unspecified statutory references are to the Penal Code.

fifty dollars (\$50) of each fine imposed pursuant to Section 4338 of the Business and Professions Code; subdivision (c) of Section 11350, subdivision (c) of Section 11377, or subdivision (d) of Section 11550 of the Health and Safety Code; or subdivision (b) of Section 264, subdivision (m) of Section 286, subdivision (m) of Section 288a, or Section 647.1 of this code, shall be deposited in a special account in the county treasury which shall be used exclusively to pay for the reasonable costs of establishing and providing for the county, or any city within the county, an AIDS (acquired immune deficiency syndrome) education program.”

However, Patague was convicted of three counts of section 288, subdivision (b)(1), which is not a crime listed in former section 1463.23.² The trial court did not have the authority to impose the AIDS education fine on Patague. (See *People v. Ogg* (2013) 219 Cal.App.4th 173, 186.) We will therefore order the trial court to strike the \$70 AIDS education fine.

The Attorney General states that this court should also strike the penalty assessment for this fine. The trial court did not order a penalty assessment on the AIDS education fine when it sentenced Patague. However, the minute order associated with the sentencing hearing (incorrectly) shows the imposition of a penalty assessment for the AIDS fine. Therefore, we will order the trial court to issue a minute order striking both the AIDS fine and the penalty assessment.

We also note that, for reasons unexplained in the record, the fine did not appear in the abstract of judgment, and therefore it does not need to be deleted from that document.

² The probation report stated that the trial court had authority to impose the AIDS education fine under section 288a, subdivision (m) (now section 287, subdivision (m)). (Former § 288a, subd. (m); § 287, subd. (m).) However, Patague was not convicted of any count of former section 288a (oral copulation), and therefore former section 288a, subdivision (m) did not apply.

B. *Section 290.3 Fine*

Patague contends, and the Attorney General concedes, that the minute order incorrectly states that the trial court imposed a fine of \$300 pursuant to section 290.3. Both parties request that this court order a correction of the abstract of judgment to indicate the amount of \$200 that the trial court orally imposed during the sentencing hearing and to order that the associated penalty assessment listed in the abstract be adjusted appropriately.

We agree that the abstract of judgment must accurately reflect what was orally pronounced at sentencing by the trial court, and ordinarily any statement inconsistent with the pronouncement of judgment may be corrected by a reviewing court as a clerical error. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) However, we do not agree with the parties that this court can order the abstract corrected to reflect a fine of \$200 under section 290.3. Although \$200 is the amount that the trial court appears to have ordered under the provision,³ that amount was not statutorily authorized.

At sentencing, the trial court must impose the fine under section 290.3 in an amount that was authorized by statute at the time that Patague committed his offenses. (*People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1248 (*Valenzuela*).) As reflected in the complaint and recited by the trial court and affirmed by Patague during his plea colloquy, the earliest date on which Patague could have committed the offenses of which he was convicted was November 28, 2009.

³ The trial court did not identify the statutory basis for the “fine of \$200 plus penalty assessment.” However, the order immediately follows other orders pursuant to sections 290 and 290.85. In context, it appears to us that the trial court referred to the fine pursuant to the related provision of section 290.3, and both parties on appeal also draw this conclusion. We therefore assume that the trial court imposed the \$200 fine under section 290.3. The minute order from the hearing indicates that the court imposed a fine of \$300 and a penalty assessment of \$930, but it does not identify the statutory basis for this fine or the count with which it is associated. The abstract indicates that the court imposed a fine of \$300 and a penalty assessment of \$930 pursuant to section 290.3.

The text of section 290.3, subdivision (a) in effect in November 2009 (and which has not since been amended) reads, “Every person who is convicted of any offense specified in subdivision (c) of Section 290 shall, in addition to any imprisonment or fine, or both, imposed for commission of the underlying offense, be punished by a fine of three hundred dollars (\$300) upon the first conviction or a fine of five hundred dollars (\$500) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine.” (§ 290.3, subd. (a).)

Section 290.3, subdivision (a) does not authorize the imposition of a fine in the amount of \$200.⁴ By its text, “section 290.3, subdivision (a) requires the trial court to impose a fine of the prescribed amount, or to impose no fine at all if it determines that the defendant does not have the ability to pay the fine. The trial court thus must impose fines in the amount of \$300 for the first qualifying conviction and \$500 for additional qualifying convictions, or no fine if the trial court determines that the defendant does not have the ability to pay the fine.” (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1370, fn. omitted (*Walz*).) A trial court that imposes a fine for a first offense under section 290.3 in any amount other than \$300 exceeds its jurisdiction. (*Walz*, at p. 1370.)

Under these circumstances, we cannot simply correct the trial court because we do not know whether the trial court’s imposition of an amount less than \$300 was simply an error or, alternatively, implicitly reflected a conclusion that Patague did not have the ability to pay the \$300 fine. Therefore, we must remand the matter to the trial court for it to impose a sex offender fine of \$300 for defendant’s first qualifying conviction, or no fine if the trial court determines that the defendant does not have the ability to pay it. (*Walz*, *supra*, 160 Cal.App.4th at p. 1371.) When making this ability-to-pay determination, the trial court should also consider the amount of the associated penalty assessment. (*Valenzuela*, *supra*, 172 Cal.App.4th at p. 1250.) As the trial court did not

⁴ The provision previously authorized imposition of a fine of \$200, but in 2006 the Legislature increased the fine to \$300. (*Valenzuela*, *supra*, 172 Cal.App.4th at p. 1248.)

impose a fine for Patague's second and third convictions, we conclude the trial court implicitly found that Patague did not have the ability to pay them. (See *People v. Burnett* (2004) 116 Cal.App.4th 257, 261.) We do not disturb that finding on appeal.

III. DISPOSITION

The judgment is modified to strike the AIDS education fine and the associated penalty assessment. The section 290.3, subdivision (a) fine previously imposed is vacated. On remand for resentencing, the trial court shall determine whether Patague has the ability to pay the fine of \$300, as prescribed by section 290.3, subdivision (a), and any associated penalty assessments, and shall impose either a \$300 fine (with penalty assessments) or no fine, as appropriate. The trial court shall issue a minute order and abstract of judgment reflecting these changes and forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

DANNER, J.

WE CONCUR:

GREENWOOD, P.J.

BAMATTRE-MANOUKIAN, J.

The People v. Patague
H046138